

A Datuk Bandar Kuala Lumpur v Badan Peguam Malaysia

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(IM)-2351-10 OF 2013
ABDUL WAHAB PATAIL, AZAHAR MOHAMED AND HAMID
SULTAN JJCA
17 FEBRUARY 2015

C *Local Government — Legislation — By-law — Kuala Lumpur City Hall*
(DBKL) entered respondent's premises to remove banners put up to celebrate its
'Festival of Rights' — DBKL contended permit to put up banners were not applied
for and that Advertisements (Federal Territory) By-Laws 1982 applied both to
D *commercial and non-commercial advertisements — Whether definition of*
'advertisement' in by-laws did not include banners — Whether respondent's
banners not advertisements to public for any purpose but only meant for own
members to celebrate occasion — Whether by-laws worded ambiguously and
E *caused public to be in dilemma whether permit should be applied for — Whether*
ambiguity also encouraged selective enforcement by DBKL

The respondent hung three banners at and beside its premises in conjunction with a 'Festival of Rights' it had organised for its members. The banner at the respondent's banister said: 'Stop the Patronage Stop the Rot'; the one at the entrance to its premises declared: 'As I believe: Freedom of Expression through Art, Music, Culture and Conscience' while the one on a tree at the car park beside the premises said: 'Rakyat Hakim Negara'. The appellant's officers removed the three banners contending the respondent did not apply for a permit or an exemption to put them up. The High Court granted a declaration sought by the respondent that the appellant's Advertisements (Federal Territory) By-Laws 1982 applied only to advertisements that were commercial in nature. Consequently, the appellant's officers had acted unlawfully and committed trespass when they entered the respondent's premises to remove the banners. In the instant appeal against that decision, the appellant contended that the by-laws made pursuant to s 102 of the Local Government Act 1975 were intended to apply to both commercial and non-commercial advertisements and empowered the appellant to 'regulate, license, restrict, prevent or remove the exhibition of advertisements for, inter alia, 'the good order and government of the local authority area'. The appellant's By-Law 2 defined 'advertisement' as 'any notification, poster, signboard, directive sign, intimation or publication exhibited for the purpose of bringing to the notice of the public any article, product, production, trade, business, profession, firm, corporation, organisation, institution, place, premises, event, activity or any other matter or publication but does not include any election advertisement'.

Held, dismissing the appeal:

- (1) Although the content of the banners in the instant case could be seen by the public, the banners were not advertisements to the public for any purpose but were for the attention of, and to set the mood for the occasion for, members of the respondent (see para 12).
- (2) The appellant's By-Law 2 defining 'advertisement' did not include any mention of banners. Even assuming a banner fell within such description, By-Law 2 explicitly stated that it applied where such was exhibited for the purpose of bringing to the notice of the public any article, product, production, trade, business, profession, firm, corporation, organisation, institution, place, premises, event, activity or any other matter or publication but did not include any election advertisement. That an election advertisement was not included did not mean every other advertisement was included. By-Law 2 did not say so. The location of the banners alone did not constitute a contravention of By-Law 2. There also had to be the prescribed purpose of 'bringing to the notice of the public' (see paras 9–10).
- (3) The appellant had the duty to make the by-law clear so that those who put up banners on occasions such as that organised by the respondent knew clearly that they would have to obtain a permit to do so and thereby avoid action being taken against them. By-Law 2 was not unambiguous and an interpretation of the ambiguity in favour of the maker of the by-law could not be made (see para 13).
- (4) The appellant submitted that the definition of advertisement in the by-law applied to both commercial and non-commercial advertisements, on private property or otherwise, and that therefore an application for a permit or an application for an exemption had to be made. However, by the appellant conceding that banners such as 'Welcome', 'Selamat Hari Raya', 'Selamat Tahun Baru Cina' and the like would not require an application to be made, it meant it was up to the appellant to decide in each and every case whether it would enforce the by-law or not. In other than commercial advertisements, it left the public in a state of uncertainty and quandary whether they needed to obtain a permit or not. Worse, it opened the way to selective enforcement. An interpretation that resulted in introducing selective enforcement was difficult to defend (see paras 15–17).
- (5) The court was unable to see how the control of advertisements regardless whether they were commercial or non-commercial, by the public or by anyone for that matter, was for 'the good order and government of the local authority'. Those two matters were unrelated unless the control of

A

B

C

D

E

F

G

H

I

- A advertisements was to prevent anyone putting up advertisements criticising or scandalising the local authority, which was not the case here (see para 8).

[Bahasa Malaysia summary]

- B Responden telah menggantung tiga kain rentang di dan di sebelah premisnya bersempena 'Festival of Rights' yang dianjurkan untuk ahli-ahlinya. Kain rentang pada birai responden menyebut: 'Stop the Patronage Stop the Rot'; yang di 'jalan masuk ke premisnya dinyatakan: 'As I believe: Freedom of Expression through Art, Music, Culture and Conscience' manakala yang di
- C pokok di tempat letak kereta sebelah premis itu menyebut: 'Rakyat Hakim Negara'. Pegawai-pegawai perayu telah menurunkan ketiga-tiga kain rentang itu dan berhujah responden tidak memohon permit atau pengecualian untuk menaikkannya. Mahkamah Tinggi telah memberi deklarasi yang dipohon oleh responden bahawa Undang-Undang Kecil Iklan (Wilayah Persekutuan) 1982
- D hanya terpakai kepada iklan-iklan yang bersifat komersial. Berikutan itu, pegawai-pegawai perayu telah bertindak menyalahi undang-undang dan melakukan pencerobohan apabila mereka memasuki premis responden untuk menurunkan kain-kain rentang itu. Dalam rayuan ini terhadap keputusan tersebut, perayu berhujah bahawa Undang-Undang Kecil yang dibuat
- E menurut s 102 Akta Kerajaan Tempatan 1975 berniat untuk terpakai kepada kedua-dua iklan-iklan komersial dan tidak komersial dan memberi kuasa kepada perayu untuk 'regulate, license, restrict, prevent or remove the exhibition of advertisements for, inter alia, 'the good order and government of the local authority area'. Undang-Undang Kecil 2 perayu mentafsirkan
- F 'advertisement' sebagai 'any notification, poster, signboard, directive sign, intimation or publication exhibited for the purpose of bringing to the notice of the public any article, product, production, trade, business, profession, firm, corporation, organisation, institution, place, premises, event, activity or any other matter or publication but does not include any election advertisement'.

G

Diputuskan, menolak rayuan:

- (1) Walaupun kandungan kain-kain rentang dalam kes ini dilihat oleh orang awam, kain-kain rentang itu bukan iklan-iklan kepada orang awam untuk apa-apa belian tetapi adalah untuk menarik perhatian, dan
- H memeriahkan suasana majlis itu, untuk ahli-ahli responden (lihat perenggan 1).
- (2) Undang-Undang Kecil 2 perayu yang mentafsirkan 'advertisement' tidak termasuk apa-apa tentang kain-kain rentang. Malah jika dengan andaian
- I kain rentang terangkum dalam gambaran tersebut Undang-Undang Kecil 2 dengan jelas menyatakan bahawa ia terpakai di mana telah diekshibitkan bagi tujuan memberi notis kepada pihak awam tentang apa-apa artikel, produk, hasil, dagangan, perniagaan, profesion, firma, perbadanan, organisasi, institusi, tempat, premis, majlis, aktiviti atau

apa-apa perkara atau penerbitan lain tetapi tidak termasuk apa-apa iklan pilihanraya. Di mana iklan pilihanraya tidak dimasukkan tidak bermaksud setiap iklan lain adalah termasuk. Undang-Undang Kecil 2 tidak menyatakan begitu. Lokasi kain-kain rentang itu sendiri tidak menyebabkan pelanggaran Undang-Undang Kecil 2. Juga perlu ada tujuan yang ditetapkan untuk 'bringing to the notice of the public' (lihat perenggan 9–10).

A

B

- (3) Perayu mempunyai kewajiban untuk membuat undang-undang kecil jelas agar mereka yang menaikkan kain-kain rentang pada acara-acara seperti yang dianjurkan oleh responden yang jelas mengetahui bahawa mereka perlu memperoleh permit untuk berbuat demikian dan oleh itu mengelakkan daripada tindakan diambil terhadap mereka. Undang-Undang Kecil 2 tidak jelas dan suatu pentafsiran untuk ketaksaan menyebelahi pembuat undang-undang kecil tidak boleh dibuat (lihat perenggan 13).

C

D

- (4) Perayu berhujah bahawa tafsiran iklan dalam undang-undang kecil terpakai kepada kedua-dua iklan komersial dan tidak komersial, atas hartanah persendirian atau sebaliknya, dan bahawa dengan itu satu permohonan untuk permit atau permohonan untuk pengecualian perlu dibuat. Walau bagaimanapun, dengan pengakuan perayu bahawa kain-kain rentang tersebut seperti 'Welcome', 'Selamat Hari Raya', 'Selamat Tahun Baru Cina' dan seumpamanya tidak memerlukan permohonan dibuat ia bermaksud ia terpulang kepada perayu untuk membuat keputusan dalam setiap dan semua kes sama ada ia akan menguatkuasakan undang-undang kecil atau tidak. Dalam iklan-iklan selain iklan komersial, ia telah membuatkan orang ramai dalam keadaan yang tidak menentu dan keadaan serba salah sama ada mereka perlu mendapatkan permit atau tidak. Lebih buruk lagi, ia membuka jalan untuk penguatkuasaan terpilih. Tafsiran yang mengakibatkan pengenalan penguatkuasaan terpilih sukar untuk dipertahankan (lihat perenggan 15–17).

E

F

G

- (5) Mahkamah tidak dapat melihat bagaimana kawalan iklan-iklan tidak kira sama ada ia adalah komersial atau tidak komersial, oleh pihak awam atau oleh sesiapa dalam hal tersebut, adalah untuk 'the good order and government of the local authority'. Dua perkara tersebut tiada kaitan kecuali kawalan iklan-iklan adalah untuk mengelakkan sesiapa daripada menaikkan iklan-iklan mengkritik atau memburuk-burukkan pihak berkuasa tempatan, yang tidak berlaku dalam kes ini (lihat perenggan 8).]

H

I

Notes

For a case on by-law, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) para 88.

A Cases referred to

Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal [2005] 3 MLJ 97, FC (refd)

B Legislation referred to

Advertisements (Federal Territory) By-Laws 1982 by-law 2
Local Government Act 1975 s 102

Appeal from: Civil Suit No S-21–163 of 2009 (High Court, Kuala Lumpur)

C *B Thanagaraj (Thangaraj & Assoc) for the appellant.*
Ranjit Singh (Razlan Hadri and Jamie Wong with him) (Ranjit Singh & Yeoh) for the respondent.

D Abdul Wahab Patail JCA:

E [1] The defendant, the Datuk Bandar Kuala Lumpur ('the appellant'), appealed against the decision of the High Court granting a declaration that the Advertisements (Federal Territory) By-Laws 1982 ('by-laws') applied only to advertisements that are commercial in nature.

F [2] The effect of that declaration was that the appellant's officers had acted unlawfully and, therefore, trespassed when they entered the premises of the plaintiff, Badan Peguam Malaysia ('the respondent'), when they did so to remove three banners as follows:

- G** (a) a banner at the banister 'Stop the Patronage Stop the Rot';
(b) a banner at the entrance to the respondent's premises 'As I Believe: Freedom of Expression through Art, Music, Culture and Conscience';
(c) a banner on a tree at the car park 'Rakyat Hakim Negara'.

H [3] Having heard the parties, we dismissed the appeal with no order as to costs and ordered that the deposit be refunded.

I [4] The submission for the appellant began with a description of the appeal, the decision of the High Court that the appeal is a fit and proper case for appellate interference, the brief facts, and with the reasoning that the purposive approach is not applicable where the words are precise and unambiguous. It was submitted that since the meaning of 'advertisement' in by-law 2 is precise and unambiguous, the High Court, therefore, erred in holding that applying the literal meaning would lead to absurd results, and that the intention of Parliament was to apply the by-laws to all advertisements including

non-commercial advertisements 'for good order and government of local authority'. A

[5] The submissions for the appellant then addressed:

- (a) the question of whether the rights of ordinary citizens are stifled; B
- (b) that mere absurdity does not entitle the court to apply the purposive approach but it must be shown that the absurdity defeats the intention of the Local Government Act 1975;
- (c) the *ejusdem generis* rule; and C
- (d) *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97 (FC).

[6] By-law 2 provides that:

'advertisement' means any notification, poster, sign board, directive sign, intimation or publication exhibited for the purpose of bringing to the notice of the public ... or any other matter or information ... but does not include any election advertisement.

E

[7] The by-laws was made under the power of s 102 of the Local Government Act 1975 which provides, inter alia, that:

In addition to the powers of making by-laws expressly or impliedly conferred upon it by any provisions of this Act every local authority may from time to time make, amend and revoke by-laws in respect of all such matters as are necessary for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area and in particular in respect of all or any of the following purposes: ... (c) to regulate, license, restrict, prevent or remove the exhibition of advertisements.

F

G

[8] At para 47 of the submissions, it was submitted that what is meant by 'good order and government of the local authority' is that all advertisements regardless of being commercial or non-commercial in nature must be regulated in terms of its contents, size, suitability and the place it is being proposed to be displayed. We are, however, unable to see how control of advertisements, regardless of whether they are commercial or non-commercial by the public or anyone for that matter, is for the good order and government of the local authority. These two matters are unrelated, unless of course the control of advertisements is to prevent anyone putting up advertisements criticising or scandalising the local authority. But it is not the appellant's case that this was so. And that is right since there is nothing in the three banners that criticised the appellant.

H

I

A [9] The power under s 102 includes the power to make by-laws to regulate, license, restrict, prevent or remove the exhibition of advertisements. It is, however, the by-laws by the appellant, ie by-law 2, that introduced the meaning of the word 'advertisement'. By-law 2 defined advertisement as meaning any notification, posters, sign board, directive sign, intimation or publication but makes no mention of a banner. Even assuming a banner falls within such description, by-law 2 explicitly says it applied where such is exhibited for the purpose of bringing to the notice of the public any article, product, production, trade, business, profession, firm, corporation, organisation, institution, place, premises, event, activity or any other matter or publication but does not include any election advertisement.

D [10] That an election advertisement is not included does not mean that every other advertisement is included. By-law 2, made by the appellant, does not say so. In the context of the other words used, 'means any ..., exhibited for the purpose of bringing to the notice of the public any article, product ...'. the words '... or any other matter or information ...'. the location of the banners alone does not constitute a contravention of by-law 2 but there must also be the prescribed purpose of bringing to the notice of the public.

E [11] It was stated at paras 7–8 of the written submissions for the appellant, that the banners were for a 'Festival of Rights' organised at the respondent's premises:

- F 7. The Respondent had on 9th December 2007 organised a festival at the Premise which is known as 'Festival of Rights'.
8. To celebrate the festival, the Respondent hung three (3) banners at the Premise and the car park adjacent to the Premise in the following manner:
- G (a) At the banister – 'Stop the Patronage Stop the Rot' ('Banister Banner');
- (b) at the entrance to the Premises – 'As I Believe: Freedom of Expression through Art, Music, Culture and Conscience' ('Entrance Banner'); and
- H (c) on a tree at the Car Park – 'Rakyat Hakim Negara' ('Tree Banner')

[all these three (3) banners are collectively referred to as 'the Banners']

I [12] Quite clearly, although the banners may be seen for the public, the subject matter and content of the banners, the banners were not advertisements to the public for any purpose but were for the attention of and setting the mood for the occasion for the members of the respondent.

[13] The appellant had the authority to make the by-laws. It had the

opportunity to make the by-laws clear. It has a duty to make the by-laws clear so that those who put up banners on occasions such as that organised by the respondent know clearly that they have to obtain a permit to do so, and thereby avoid having action being taken against them. We have no doubt that the respondent, being the Majlis Peguam Malaysia, had no intention of breaking the law. By-law 2 is not unambiguous. In the event of ambiguity, the interpretation cannot be made in favour of the maker of the by-laws even if it is to protect the appellant from an action in trespass.

A

B

[14] To sum up, the issue pursued by the appellant is a question of interpretation, whether the definition of advertisement in the said by-laws applies to commercial advertisements or to all advertisements commercial as well as non-commercial.

C

[15] It was submitted that the definition applied to commercial as well as non-commercial advertisements, on private property or otherwise, and therefore regardless whether the advertisement is commercial or not, an application for a permit must be made or alternatively an application for an exemption may be made. Counsel for the appellant, however, conceded that banners such as with 'Welcome'. 'Selamat Hari Raya'. 'Selamat Tahun Baru Cina' or the like do not require that an application for a permit or for an exemption be made.

D

E

[16] That submission betrayed the inherent flaw in the submission. It would mean it is up to DBKL to decide in each and every case whether it would enforce the by-laws or not. In other than commercial advertisements, it leaves the public in a state of uncertainty and quandary whether it needs to obtain a permit or not. Worse, it opens the way to selective enforcement.

F

G

[17] An interpretation that results in making introducing selective enforcement is difficult to defend. The only other alternative without such an inherent flaw is the interpretation that the by-laws applies to commercial advertisements only. It is the DBKL that makes the by-laws. If the intention is that it is to be applied to non-commercial advertisements, then it is for the DBKL to amend the by-laws and to set out very clearly when an application for a permit or for an exemption has to be made and when they are unnecessary.

H

[18] It is not therefore, in our view, demonstrated by the appellant, that the High Court had not only erred, but had so erred affecting the merits of the decision that it demands appellate intervention to correct the injustice caused.

I

[19] For the foregoing reasons, we dismissed the appeal.

A *Appeal dismissed.*

Reported by Ashok Kumar

B

C

D

E

F

G

H

I